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No. 80-2158

In the Supreme Court of the United States

OCTOBER TERM, 1980

ISADORE SPIEGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a person doing business as a sole proprietor may refuse on Fifth Amendment grounds to comply with a grand jury subpoena for business records on the ground that the contents of the records are potentially incriminating.

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OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. 1a). The contempt orders of the district court (*id.* at 8a-9a, 11a-12a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1981. A petition for rehearing was denied on April 21, 1981. The petition for a writ of certiorari was filed on June 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 7, 1980, a federal grand jury sitting in the District of New Jersey caused a subpoena duces tecum to be issued to the custodian of records of "I. Spiegel and any related entity doing business as 'Spiegel Trucking.' " This subpoena, which was served on petitioner, called for the

production of all of the business records of "I. Spiegel" for a five-year period. Petitioner moved to quash the subpoena, and several hearings were held, which established that "I. Spiegel" was a sole proprietorship (Pet. App. 73a), that petitioner had used a single checking account (held in the name of the business) to pay his personal and business expenses (*id.* at 73a-74a), that petitioner had prepared or directed others to prepare the business's records, and that petitioner was the sole custodian of the records (*id.* at 34a).[1]

At the second and third hearings, on November 17 and December 23, 1980, the district court ruled that the subpoenaed documents were business records and that petitioner had no Fifth Amendment right to refuse to permit the records to be produced (Pet. App. 36a-37a, 81a-83a, 86a, 88a). The court suggested that there were numerous ways in which the records could be produced to avoid any possibility of incrimination based on the "act of production," and the court offered to make appropriate arrangements to that end (*id.* at 66a-67a, 86a). Petitioner nonetheless persisted in his refusal to allow the records to be produced, and on January 9, 1981, the district court held petitioner in contempt, pursuant to 28 U.S.C. 1826 (Pet. App. 8a-9a).[2] The district court imposed a fine of $100, which was later

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[1]The court also found that, "It may well be that Mr. Spiegel chooses from time to time to do some of his business in a corporate name and some of his business as a sole proprietorship. It is perfectly evident from the testimony of [Mr. Spiegel's accountant], who I believe, he commingles the records, commingles the employees, and, at least for purposes of this hearing, the most critical of employees, the four bookkeepers were required to keep track of all these records" (Pet. App. 82a).

[2]The district court also ordered the subpoenaed records to be deposited with the clerk of the court under seal pending final review of the court's contempt order. On January 15, 1981, one of petitioner's employees delivered several sealed cartons of documents to the clerk.

increased to $600 (*id.* at 11a-12a), for each day that petitioner remained in contempt by refusing to produce the records. On March 16, 1981, the court of appeals affirmed without opinion (*id.* at 1a).[3]

ARGUMENT

Petitioner contends that his failure to comply with the subpoena is justified under the Fifth Amendment because he transacts business as a sole proprietor, and the records under subpoena are an amalgam of "personal and business document[s]" (Pet. 10). Petitioner's argument lacks merit.

1.a. The purpose of the Fifth Amendment privilege "is to prevent compelled self-incrimination, not to protect private information." *Maness* v. *Meyers*, 419 U.S. 449, 473 (1975) (White, J., concurring). This Court "has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort." *Fisher* v. *United States*, 425 U.S. 391, 399 (1976); see *Andresen* v. *Maryland*, 427 U.S. 463, 477 (1976).

Petitioner's argument to the contrary—that he cannot be required, consistent with the Fifth Amendment privilege against self-incrimination, to allow the production of his business records—rests on the proposition stated in *Boyd* v. *United States*, 116 U.S. 616 (1886), and repeated in the cases on which petitioner relies (see Pet. 7-8), that the government cannot compel an individual to produce his own papers.[4] However, at least this aspect of *Boyd* was

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[3]On May 26, 1981, the court of appeals stayed its mandate pending disposition by this Court of the petition for a writ of certiorari.

[4]In *Fisher* v. *United States, supra*, 425 U.S. at 409, the Court noted: "To the extent * * * that the rule against compelling production of private papers rested on the proposition that seizures of or subpoenas for 'mere evidence,' including documents, violated the Fourth Amendment and therefore also transgressed the Fifth * * *, the foundations

rejected in *Fisher* v. *United States, supra*, in which the Court held that the Fifth Amendment "applies only when the accused is compelled to make a *testimonial* communication that is incriminating" (425 U.S. at 408; emphasis in original). In *Fisher* the Court further stated (*id.* at 409-410; emphasis added):

> [T]he preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence either of the taxpayers or of anyone else.[11] The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, *whether his own* or that of someone else.

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[11]The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege. * * *. And, unless the Government has compelled the subpoenaed person to write the document, * * * the fact that it was written by him is not controlling with respect to the Fifth Amendment issue. Conversations may be seized and introduced in evidence under proper safeguards, * * * if not compelled. In the case of a documentary subpoena the only thing compelled is the act of producing the document and the compelled act is the same as the one performed when a chattel or document not authored by the producer is demanded. * * *.

Based on the Court's analysis in *Fisher*, therefore, the district court's order requiring petitioner to produce his business records did not violate the Fifth Amendment, and

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for the rule have been washed away. In consequence, the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him."

petitioner's contempt cannot be justified on Fifth Amendment grounds. The contents of the subpoenaed records are not "testimonial," and a documentary subpoena does not compel a person to be a "witness" or to testify. Moreover, the records at issue were not prepared because of government compulsion. That petitioner prepared or directed the preparation of the records cannot by itself shield them from subpoena, because "the sole compulsion was to furnish the document to the government." *Matter of Grand Jury Empanelled February 14, 1978 (Colucci)*, 597 F. 2d 851, 861 n.24 (3d Cir. 1979). Compare *Garner* v. *United States*, 424 U.S. 648 (1976). See *Matter of Grand Jury Empanelled February 14, 1978 (Markowitz)*, 603 F. 2d 469, 476-477 (3d Cir. 1979); *United States* v. *Hankins*, 565 F. 2d 1344, 1348 (5th Cir. 1978), clarified, 581 F. 2d 431, cert. denied, 440 U.S. 909 (1979) ("compulsion must result in [the person claiming the privilege] being made a *witness* against himself" (emphasis in original)); cf. *Hollis* v. *Smith*, 571 F. 2d 685, 690 (2d Cir. 1978) (Friendly, J.) ("the compulsion must be of testimony"). In sum, as the First Circuit has stated, "The line of cases culminating in *Fisher* have stripped the content of business records of any Fifth Amendment protection." *In re Grand Jury Proceedings (Martinez)*, 626 F. 2d 1051, 1055 (1980).

b. The Court in *Fisher*, having concluded that the Fifth Amendment privilege protects from disclosure only those communications that are compelled, testimonial, and incriminating, considered the implicit testimonial component of *producing* subpoenaed documents to be the only act that is compelled by a documentary subpoena. The Court thus considered whether compliance would constitute evidence admitting the existence of the documents, the identity of the documents sought and produced, or their authenticity (425 U.S. at 409-413). In light of the particular facts in *Fisher*, the Court found that compliance in that case would not raise these issues (*id.* at 412-413).

Here, petitioner contends (Pet. 9) that the subpoena cannot constitutionally be enforced because compliance "would constitute implicit authentication." This contention lacks force, however, because petitioner rebuffed the district court's efforts to assure that the act of production would carry no such implication (see, *e.g.*, Pet. App. 86a-87a),[5] and the government has "agreed on the record not to use the

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[5]Counsel for petitioner and the district court had the following colloquy at the hearing of December 23, 1980 (Pet. App. 86a-87a):

THE COURT: So we stand by where we are. We could do it under Bellis. We could do it under Fisher. We could do it under Andresen. We can even avoid the problem of the act of production. I will work out any way of producing them that you wish. But you are going to take the position that we may not have them at all; isn't that true?

MR. DYSON: That's true. And, further, because of the Fifth Amendment, and, further, that any method of working it out to avoid the act of production, I take the position that you don't avoid the act of production.

THE COURT: We could avoid it very simply. Tell him to put it back where he took them away. The government will not watch him. The government will give a subpoena to the bookkeeper, which they are perfectly prepared to do.

That would avoid the act of production, wouldn't it?

MR. DYSON: I understand what you are saying, Judge.

THE COURT: You're not saying it wouldn't—

MR. DYSON: I'm not saying it wouldn't—

* * * * *

THE COURT: Am I correct that will avoid the act of production on him?

MR. DYSON: No.

THE COURT: I'm wrong?

MR. DYSON: If I understand what you are saying—

THE COURT: Tell him to put it back in the company.

[footnote continued]

act of production against [petitioner] *in any manner*" (C.A. Br. 16; emphasis added). Thus, the act of production here would give rise to no danger of self-incrimination. See *United States* v. *Davis*, 636 F. 2d 1028, 1041 (5th Cir. 1981) (the testimonial aspect implicit in compliance "should not be a ground for refusing to produce the documents as long as the fact of compliance with the summons is not introduced into evidence at the incriminated party's trial"). Compare *In re Grand Jury Proceedings (Martinez), supra*, 626 F. 2d at 1055-1058; *United States* v. *Authement*, 607 F. 2d 1129, 1131-1132 (5th Cir. 1979).

2. The cases upon which petitioner relies do not lend substantial support to his argument that he has a Fifth Amendment privilege as to the contents of the records of his business. In *United States* v. *Beattie*, 541 F. 2d 329 (2d Cir. 1976), for instance, the court held that a taxpayer could not be required to produce letters that he had written to his accountant, but which were in the taxpayer's possession. It is not clear, however, that the court based its holding on any belief that the Fifth Amendment protected the contents of the letters. Indeed, the court's discussion of the issue, while brief, suggests that the holding was based on the need to protect the particular testimonial aspects of the act of production that it perceived there (541 F. 2d at 331). See *In re*

MR. DYSON: That is not where he keeps the records in the normal course of his business.

THE COURT: Not the testimony of the accountant.

* * * * *

THE COURT: All right, Mr. Dyson. I'm persuaded that there is nothing I can do to avoid the problem, largely because Mr. Spiegel does not wish to avoid the problem. I have found and you have even agreed with me that the fact that he took them away one day did not make them into personal records if they weren't before he took them.

Grand Jury Proceedings (Martinez), supra, 626 F. 2d at 1056. Moreover, the Second Circuit has more recently emphasized that to trigger Fifth Amendment protection the thing compelled must be testimony (see *Hollis* v. *Smith, supra*), thus undermining petitioner's contention that the holding in *Beattie* was based on the view that the Fifth Amendment privilege attaches to the content of business records. But cf. *In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981*, No. 81-6086 (2d Cir. Aug. 7, 1981), slip op. 4529 n.1.

The Ninth Circuit's decision in *United States* v. *Helina*, 549 F. 2d 713, 716 (1977), provides even less support for petitioner's view because the question whether the contents of business records are privileged under the Fifth Amendment was not at issue in that case, the government not having challenged the defendant's invocation of the Fifth Amendment. The court's treatment of the Fifth Amendment issue in *Helina* was not only dictum, but it was also expressly qualified (*id.* at 716) by the statement that this Court's then-recent decisions in *Fisher* and *Andresen* "perhaps intimate a different result." Also dictum is the Eighth Circuit's discussion of the issue in *United States* v. *Plesons*, 560 F. 2d 890, cert. denied, 434 U.S. 966 (1977), in which the issue was whether medical records that the defendant had turned over to the grand jury should have been suppressed on the ground that the defendant had not been advised of his Fifth Amendment privilege to withhold the records. The Eighth Circuit concluded that suppression was not required because a grand jury witness need not always be advised of his constitutional rights (560 F. 2d at 894-895). Whether the defendant had any Fifth Amendment rights to withhold the records was therefore unnecessary to the decision.[6]

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[6]Moreover, the court's conclusion that the defendant had such a right was based entirely on cases that were decided prior to *Fisher* (see 560 F. 2d at 892-893). To the extent that the court sought to distinguish *Fisher*,

Only the Fifth Circuit's decision in *United States* v. *Davis, supra*, 636 F. 2d at 1042-1044, squarely holds that the Fifth Amendment privilege protects the contents of business records that have not been created under government compulsion. There, the court stated (*id.* at 1042): "[T]he fifth amendment creates a zone of privacy which absolutely protects documents from production by summons or subpoena as long as they are in the hands of the owner." Compare *Maness* v. *Meyers*, 419 U.S. 449, 473 (1975) (White, J., concurring) (purpose of the Fifth Amendment privilege "is to prevent compelled self-incrimination, not to protect private information").[7] Despite the Fifth Circuit's unequivocal statement of the law in *Davis*, it must be emphasized that the court candidly questioned the logic of its own analysis (636 F. 2d at 1042-1043; emphasis added; footnote omitted):

> Support for this distinction [between "personal" and "business" records] might be found in *Andresen* v. *Maryland*, 1976, 427 U.S. 463, 96 S. Ct. 2737, 49 L.Ed.2d 627, which, in upholding a seizure of documents under a warrant, repeatedly stressed that the documents seized were business documents. 427 U.S. at 471, 474, 475, 477, 96 S. Ct. at 2743, 2745, 2746.

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it did so on the ground that the defendant's compliance with the subpoena would operate "as an assurance that the patient records produced were the ones demanded" (560 F. 2d at 893). Thus, the Eighth Circuit here, like the Second Circuit in *United States* v. *Beattie, supra*, appears to have taken a position that is equivocal at best on the question whether the contents of business records are protected under the Fifth Amendment, emphasizing instead the testimonial aspects of the act of production. See *In re Grand Jury Proceedings (Martinez), supra*, 626 F. 2d at 1055-1058.

[7]The Third Circuit has also held that the Fifth Amendment creates a "zone of privacy," but it has emphasized the "non-business" character of the documents protected within this zone. See *In re Grand Jury Proceedings (Johanson)*, 632 F. 2d 1033, 1042-1044 (1980).

> Indeed, if *Andresen* did not draw such a distinction, arguably it altogether abolished the *Boyd* principle sub silentio, for its fifth amendment analysis looked solely to the existence of compelled testimonial communication. *It is difficult to find a logical reason for applying the Boyd principle to subpoenaed documents and not documents taken in a search, as in Andresen.* See *Andresen* v. *Maryland*, 1976, 427 U.S. 463, 484-492, 96 S. Ct. 2737, 2750, 49 L.Ed2d 627 (Brennan, J., dissenting). * * *
>
> This Court, however, has already rejected interpretations of *Fisher* and *Andresen* that would either limit the *Boyd* principle to non-business records or abolish it altogether. [citations omitted] * * * We are bound by these cases. Their cumulative teaching is that any incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, rather than in a representative capacity, and which he himself wrote or which were written under his immediate supervision, are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process, regardless of whether they are business-related or more inherently personal in content.

In *Davis*, the Fifth Circuit embraced a result that it found illogical because it believed that that result was required by the law of the circuit. Nonetheless, at least some previous Fifth Circuit decisions support the government's position here—that an individual may not, so long as he is protected from incrimination by the act of production itself, invoke the privilege to defeat a documentary subpoena because the demand that he produce papers is not a demand that he become "a *witness* against himself." *United States* v. *Hankins, supra*, 565 F. 2d at 1348 (emphasis in original). See *United States* v. *Authement, supra*, 607 F. 2d at 1131-1132;

United States v. *Greenleaf*, 546 F. 2d 123, 126 & n.7 (5th Cir. 1977). But see *In re Grand Jury Subpoena (Kent)*, 646 F. 2d 963 (5th Cir. 1981).[8] Because the court in *Davis* openly questioned its own analysis, and because it failed to consider at least apparently inconsistent Fifth Circuit case law, we believe that it would be premature for this Court to grant certiorari at this time to resolve a conflict based on *Davis*. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

We note in closing that this case does involve an issue of considerable importance. Moreover, while we believe that the result reached here represents a proper application of the principles delineated by the Court in *Fisher*, we acknowledge the incipient emergence of a conflict among the circuits predicated on an apparent rejection by some circuits of the reasoning of *Fisher* that the incriminating nature of the contents of documents does not itself afford a basis for invocation of the Fifth Amendment privilege. Nevertheless, because it is not yet clear that the circuits will, upon further consideration of the somewhat complex issue involved, settle into a clear pattern of conflict, and because the decision below is fully consistent with *Fisher*, we believe that review of the issue by the Court is not necessary at the present time.

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[8]The *Kent* court noted (646 F. 2d at 968) that "[t]he prevailing justification for the fifth amendment's application to documentary subpoenas is the 'implicit authentication' rationale." The question whether production could be required if the government were formally to grant immunity commensurate with the act of production (see *In re Grand Jury Proceedings (Martinez)*, *supra*, 626 F. 2d at 1055-1058) was apparently viewed as not presented in *Kent*. See 646 F. 2d at 969 n.5.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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